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## Dower--Property Subject to Right--Contract Before Marriage to Will to Another

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ant's general reputation, past raids on the house, and testimony of ten police officers as to its reputation, sufficient to prove the existence of a place of prostitution. In *State v. Johnson*, 189 Minn. 546, 250 N. W. 366 (1933), which is summarily rejected by the majority in the instant case, one instance of solicitation of a police officer plus the general reputation of the house, of the inmates, and of defendant were held sufficient to prove the *corpus delicti*. In *Commonwealth v. Levandowski*, 90 Pa. Super. 403 (1927), involving a conviction for keeping a place of prostitution, the *corpus delicti* was held adequately established where the house bore the reputation of a bawdyhouse and there was evidence that defendant had furnished one witness a girl whom he took upstairs and paid money, some of which was turned over to defendant, that no fornication took place and that same girl later solicited another witness to go upstairs with her. As a general principle, the *corpus delicti* may be established by circumstantial evidence, 2 BISHOP, NEW CRIMINAL PROCEDURE (2d ed. 1913) 1057, although when it is to be so established, the evidence must include all uncertainty from the minds of the jury. *State v. Bennett*, 93 W. Va. 548, 117 S. E. 371 (1923). It is not, however, necessary that each particular circumstance be of this conclusive character, but the combined effect of all the circumstances in the case must be such as to prove the *corpus delicti* beyond reasonable doubt. *Patterson v. State*, 202 Ala. 65, 79 So. 459 (1918); *State v. Davidson*, 30 Vt. 126 (1858). But cf. *State v. Bennett*, *supra*. Although no one circumstance in the instant case was sufficient to prove the *corpus delicti*, the real issue was whether all of them in the aggregate were not sufficient to do so beyond a reasonable doubt. The most nearly analogous cases seem to support the dissent.

G. R. A., JR.

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DOWER—PROPERTY SUBJECT TO RIGHT—CONTRACT BEFORE MARRIAGE TO WILL TO ANOTHER. —Before decree in a pending divorce proceeding. *H* undertook by a written contract with *W* to continue to furnish *W* and their two children their present residence as a home, to supply necessities, and pay an annuity as long as *W* remained unmarried, and that upon his death all his net estate should be divided equally between *W* and the children, in return for *W*'s surrender of alimony claims and property settlement. The contract was recorded and divorce granted. *H* having remarried, plaintiff,

his widow, petitioned for assignment of dower. W and the two children opposed and their demurrer to plaintiff's bill was sustained in the circuit court. *Held*, that where a husband, having validly contracted to devise all his property to his wife and children, obtains a divorce and remarries another, the latter is not entitled to dower in realty he acquired before the marriage. Judgment affirmed. *Harris v. Harris*, 43 S. E. (2d) 225 (W. Va. 1947).

*Davidson v. Davidson*, 72 W. Va. 747, 79 S. E. 998 (1913), refused enforcement of a parol agreement by the putative father of a child born out of wedlock to provide in the will for the child and its mother in consideration of noninstitution of bastardy proceedings. The court held that the evidence did not clearly prove the contract because the agreement was uncertain and indefinite; but the court expressly recognized that even an oral contract to make a will, if certain and definite in its terms, and supported by sufficient consideration, may be enforceable against the estate of the promisor. In the instant case the validity of the contract as respects consideration definiteness, and the statute of frauds, while expressly found by the court, was apparently not questioned by the plaintiff, who relied on the efficacy of the contract to defeat her dower in the real estate of her deceased husband. The dower statute in West Virginia broadens the concept to include surviving husbands but otherwise substantially codifies the common law. W. VA. REV. CODE (1931) c. 43, art. 14, § 3. The instant case, in reasoning that the effect of a valid contract to make a will was to make H a trustee of a legal title to the real estate, so that at the time he held no estate of inheritance, accords with the doctrine approved in Virginia. *Chapman v. Chapman's Trustee*, 92 Va. 537, 24 S. E. 225 (1896); *Burdine v. Burdine*, 98 Va. 515, 36 S. E. 992 (1900). The propriety of dealing with the situation in terms of trusts, while conventional, has been seriously doubted, 1 SCOTT, TRUSTS (1939) § 13; cf. 3 BOGERT, TRUSTS AND TRUSTEES (1946) 74, but the result is the same whether phrased in terms of the promisor's being trustee or the promisee's being holder of the equitable title. In any event, H at the time of his remarriage had no estate which would descend to his heirs, hence no estate of inheritance, 1 WASHBURN, REAL PROPERTY (6th ed. 1902) 51, and therefore does not come within the West Virginia statute which is limited to "real estate whereof the deceased spouse . . . was . . . during coverture seised of or entitled to an estate of inheritance." Plaintiff's claim of lack of knowledge of the contract was disallowed in

view of the constructive notice arising from its recordation and of uninterrupted occupancy by W and the children of part of the premises which should have put plaintiff on inquiry; but it was considered to be immaterial in any event, because of the principle that marriage confers rights only in property that the spouse holds beneficially at the time of the ceremony. *Newberry v. Shannon*, 268 Mass. 116, 167 N. E. 292 (1929). An early Virginia holding that a wife was not barred of dower by the husband's executory contract to sell land entered into before marriage of which she had no notice at the time of the marriage, *Baxton v. Lee*, 4 Hen. & M. 376 (Va. 1809), has not been followed in *Burdine v. Burdine*, *supra*, the husband's covenant to devise Blackacre to a slave in consideration of her remaining with him during his life was held enforceable, and his subsequently married wife was not entitled to dower in Blackacre. While in *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710 (1896), a contract somewhat similar to the one here involved was refused enforcement because it was vague and productive of a harsh result if enforced, in *Smith v. Smith*, 340 Ill. 34, 172 N. E. 32 (1931), a widower's contract to convey or devise all his property to his children was enforced against his estate, when he later remarried and died without making any provision for his children, and his widow's claim to dower was denied. It has been said to be a general maxim that the law favors dower. *Lewis v. Apperson*, 103 Va. 624, 49 S. E. 978 (1905). A husband cannot deprive his wife of dower by disposing of his estate by will. See 1 SCRIBNER, DOWER (2d ed. 1883) 604. But these propositions apply to dower after its inception. In the language of Judge Haymond in the principal case, "This Court fully recognizes the consideration which the law accords to the right of dower and the protection which it furnishes for its preservation and its full use and enjoyment *whenever its existence is established*." (Italics supplied.) *Harris v. Harris*, *supra*. West Virginia is thus in accord with the great weight of authority. While at first blush the result may seem harsh, no contrary result would be consistent with the settled laws as to the effect during the owner's lifetime of contracts to convey or devise and of marriage respectively. The promisee in a contract to devise real estate has an absolute right to enforce the contract against the promisor's estate. *Stone v. Burgeson*, 215 Ala. 23, 109 So. 155 (1926); *Kreman v. Kreman*, 203 Iowa 1166, 211 N. W. 699 (1927). Under certain circumstances he may recover for a breach even during the promisor's lifetime, *Rich-*

*ardson v. City Trust Co.*, 27 F. (2d) 35 (C. C. A. 7th, 1928) ; while the right to dower is inchoate and does not ripen into an estate or interest until death of the spouse. To allow dower as against a right vested in a third person at the time of marriage would therefore be to make an inchoate right superior to a vested absolute right, prior in time. The instant case does not involve, nor purport to settle, the effect of an antecedent contract on realty acquired by the promisor after his marriage.

D. B. H.

#### EMINENT DOMAIN—OBSOLETE BUILDINGS—PROOF OF VALUE.—

The state road commission skillfully and properly performed work of improvement upon land taken by eminent domain for a public road. Resulting slides, however, completely destroyed a vacated hospital building on the unappropriated portion of the land. At the trial in the eminent domain proceeding, the owners introduced evidence over objection showing the reproduction cost of the building at present price levels, less depreciation, but no evidence to show that immediately prior to its destruction the building had any market value or could serve any useful purpose. The court instructed on the reproduction cost theory of recovery and refused the state's requested instructions on the "willing buyer-willing seller" theory of market value specifically calling attention to the long continued disuse of the building. Verdict and judgment for the owner included compensation for the building despite the lack of showing of any current market for it. *Held*, reversible error to permit introduction of evidence as to the reproduction cost, less depreciation, of a building in eminent domain proceedings without a showing of actual value. Judgment reversed and remanded for new trial. *State, by State Road Commission v. Boyd*, 41 S. E. (2d) 665 (W. Va. 1947).

Following the eclectic principle of allowing the jury in eminent domain proceedings to consider a wide range of evidence connected with value and in sustaining verdicts based on such a composite showing, West Virginia has specifically approved consideration of reproduction cost less depreciation as bearing on valuation of property in eminent domain proceedings. *Baltimore & O. R. R. v. Bonafield*, 79 W. Va. 287, 90 S. E. 868 (1916) ; *cf. Hearn v. McDonald*, 69 W. Va. 435, 71 S. E. 568 (1911). The general practice is of course to regard fair market value as the test determining proper valuation for compensation purposes, *Tennessee Valley Authority*